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In the Supreme Court of the United States

OCTOBER TERM, 1997

SOUTHEASTERN MARITIME COMPANY, ET AL.,
PETITIONERS

v.

ALONZO BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARVIN KRISLOV
Deputy Solicitor for National Operations

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Section 10(f) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 910(f), provides for annual cost-of-living adjustments for benefit recipients who are permanently totally disabled. No provision is made for recipients who are temporarily totally disabled. The question presented is:

Whether the initial compensation payable upon a determination of permanent total disability, on which future cost-of-living adjustments will be based, should be calculated as though the claimant had received similar adjustments during a preceding period of temporary total disability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 121 F.3d 648. The notice of statutory affirmance issued by the Benefits Review Board (Pet. App. 16-17) and the decisions of the administrative law judge (Pet. App. 5-15) are unreported.[1]

[1] The appendix to the petition does not contain the first administrative decision in this case (dated August 18, 1986), which found respondent to be temporarily totally disabled. See Pet. App. 6. We have lodged a copy of that decision with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1997. A petition for rehearing was denied on November 26, 1997. Pet. App. 3-4. The petition for a writ of certiorari was filed on February 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires a covered employer to pay compensation for an employee's disability or death resulting from an injury sustained on or near navigable waters of the United States. 33 U.S.C. 903(a), 904(a). Section 8 of the Act provides for compensation for four different types of disability: permanent total, temporary total, permanent partial, and temporary partial. 33 U.S.C. 908(a)-(c) and (e). Because a total disability is not considered "permanent" until the claimant has reached the point of "maximum medical improvement," see, *e.g.*, *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 124-126 (5th Cir. 1994) (White, J., sitting by designation), most claimants who are eventually classified as permanently totally disabled are first classified as temporarily totally disabled for some period after the date of their injury.

A covered employee who is either temporarily or permanently totally disabled generally receives an LHWCA benefit equal to 66 2/3% of his average weekly wages, calculated as of the time of the disability and subject to certain maximum and minimum limitations. 33 U.S.C. 906(b), 908(a)-(b), 910. Under Section 10(f) of the Act, however, the compensation payable with respect to permanent total disability is subject to limited yearly cost-of-living adjustments:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of—
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or
>
> (2) 5 per centum.

33 U.S.C. 910(f). There is no comparable statutory provision for adjustments to the compensation paid with respect to any other type of disability, including temporary total disability.

2. On August 14, 1983, respondent Brown sustained a head injury while working for petitioner Southeastern Maritime Company. Pet. App. 6. He subsequently developed a disabling psychological disorder diagnosed as a post-traumatic reaction. *Ibid.* On August 18, 1986, an administrative law judge (ALJ) awarded respondent compensation for temporary total disability because of his psychiatric and psychological problems. *Ibid.*[2] That award was

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[2] LHWCA claims are initially adjudicated by the Department of Labor's Office of Workers' Compensation Programs (OWCP). See 33 U.S.C. 919(a) and (c); 20 C.F.R. 702.311-702.315. If OWCP is unable to resolve a claim informally, the claimant or employer may obtain a hearing before an ALJ. 33 U.S.C. 919(c) and (d); 20 C.F.R. 702.316-702.317, 702.331. ALJ decisions are reviewable by the Department's Benefits Re-

retroactive to the date of injury and was effective until further notice. 8/18/96 ALJ Dec., slip op. 9 (see note 1, *supra*).

Respondent Brown later sought compensation for permanent total disability beginning January 29, 1987, because a psychiatrist had concluded on that date that he was permanently and totally disabled. Pet. App. 6-7. Petitioners (the employer and its insurance carrier) responded by seeking to terminate payment of any compensation, on the ground that another psychiatrist had testified, in a related lawsuit, that respondent was malingering. *Ibid.* In January 1994, an ALJ found that the second psychiatrist had since changed his opinion and had concluded that respondent was indeed permanently and totally disabled by psychiatric problems arising out of his accident. *Id.* at 7. The ALJ awarded compensation for permanent and total disability beginning January 29, 1987. *Ibid.*

3. Petitioners did not further dispute the award of permanent total disability benefits, but they sought a modification of the award to provide that cost-of-living adjustments under Section 10(f) of the Act would begin from the date as of which respondent was found to have become permanently disabled (January 29, 1987), not from the date of injury. Pet. App. 11. In August 1994, an ALJ denied that request. *Id.* at 10-15. He concluded that this case was controlled by *Holliday*

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view Board, and the Board's decisions are subject to review in the courts of appeals. 33 U.S.C. 921(a)-(c); 20 C.F.R. 702.391, 802.410(a). The Director of OWCP may appear as a party in the administrative proceedings, see 20 C.F.R. 702.333(b), 801.2(a)(10), and must be named as a respondent in any proceeding for review in the court of appeals. See Fed. R. App. P. 15(a); *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 805-808 (1997).

v. *Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A 1981), which held that although no cost-of-living adjustment is to be made during any period of temporary total disability, the first payment for the period after the disability becomes total (which then serves as the basis for future adjustments) should be computed *as if* the claimant had received adjustments during the temporary disability period. See *id.* at 417, 422. Although the ALJ recognized that *Holliday* had been overruled by the Fifth Circuit after its separation from the Eleventh, he concluded that the case was still controlling in the Eleventh Circuit. Pet. App. 12-13 (discussing *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc) (overruling *Holliday*), and *Director, OWCP* v. *Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (following *Holliday*)). He therefore ordered petitioners to compute respondent's disability compensation by including cost-of-living adjustments retroactive to the date of injury (August 14, 1983). Pet. App. 14.

In September 1994, petitioners appealed the ALJ's decision with respect to cost-of-living adjustments to the Benefits Review Board. C.A. App. R28. In 1996, Congress directed that all appeals that had been pending before the Board for more than one year were to be deemed affirmed if the Board did not act by September 12, 1996. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-211. The Board did not act on petitioners' appeal before the deadline, and the ALJ's decision therefore became final as of that date. Pet. App. 16-17.

4. The court of appeals affirmed. Pet. App. 1-2.[3] In a brief per curiam opinion, the court acknowledged that the decision in *Holliday* had been overruled by the Fifth Circuit and rejected by the Second and Ninth Circuits. *Id.* at 2. It noted, however, that *Holliday*'s holding had been reaffirmed by the Eleventh Circuit after that court separated from the Fifth Circuit. *Ibid.* (citing *Hamilton*, *supra*). The court therefore concluded that, "[n]otwithstanding petitioners' arguments regarding the wisdom of *Holliday* or the singularity of its holding relative to the other circuits, it is still binding precedent in our circuit" in the absence of en banc reconsideration. *Ibid.* Although petitioners thereafter sought rehearing en banc, the full court rejected that suggestion without comment or a poll of the court. Pet. App. 3-4.

DISCUSSION

1. The Eleventh Circuit's decision in this case and its refusal to consider the matter en banc confirm that court's continued adherence to a position that is inconsistent with the text of the LHWCA. Section 10(f) of the Act provides for limited cost-of-living adjustments to "the compensation or death benefits payable [under the Act] for *permanent* total disability or death." 33 U.S.C. 910(f) (emphasis added). As we have explained (see page 2, *supra*), LHWCA claimants become "permanently" totally disabled only once it is shown that they remain totally disabled after reaching the point of maximum medical improvement. The Director of the OWCP and the courts of appeals for the Second, Fifth and Ninth Circuits have read

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[3] The Director did not participate in the proceedings before the court of appeals.

the plain language of the Act to authorize cost-of-living adjustments only after the disability has become "permanent" for statutory purposes. See *Bowen* v. *Director, OWCP*, 912 F.2d 348 (9th Cir. 1990); *Lozada* v. *Director, OWCP*, 903 F.2d 168 (2d Cir. 1990); *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc). As the Fifth Circuit observed, Section 10(f) contains "no hint of a 'catch-up' clause that would provide that the first adjustment occurring during *permanent* total disability shall be larger than subsequent years' adjustments in order to make up for adjustments not made during the [preceding period] of *temporary* total disability." *Phillips*, 895 F.2d at 1035; see also *Bowen*, 912 F.2d at 351.[4]

This Court has repeatedly instructed that, in interpreting the LHWCA as in other contexts, plain statutory language controls unless it leads to results that are "absurd or glaringly unjust." *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 804 (1997); see also, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295 (1995); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475-477 (1992). In this instance, adherence to the statutory text merely implements limitations that Congress deliberately imposed on the disability benefits mandated by the LHWCA. Cf. *Potomac Elec. Power Co.* v. *Director*,

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[4] As the Ninth Circuit pointed out in *Bowen*, 912 F.2d at 351, "Had Congress intended § 10(f) to be interpreted as [the Eleventh Circuit interprets it], it could have included a 'catch-up' clause as it did in § 10(h) of the LHWCA, 33 U.S.C. § 910(h), which was passed at the same time as § 10(f). * * * Congress knew how to draft a provision to account for inflation during periods of stable compensation, but did not include such a provision in § 10(f)."

OWCP, 449 U.S. 268, 282 & n.24 (1980) ("[L]ike most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers."). Cost-of-living adjustments help prevent the value of a compensation award from being eroded over time by the effects of general economic inflation. See 5 A. Larson & L. Larson, *Larson's Workers' Compensation Law* (*Larson's*) § 60.61 (1997); 118 Cong. Rec. 36,386 (1972) (statement of Rep. Steiger). Because the rate of inflation over time is difficult to predict, however, inflation adjustments introduce significant uncertainty into the actuarial computations necessary to set premiums for the insurance that private employers typically purchase to cover the cost of LHWCA claims. That, in turn, increases the cost and decreases the availability of such insurance. See S. Rep. No. 81, 98th Cong., 1st Sess. 21, 33 (1983); 129 Cong. Rec. 16,254 (1983) (statement of Sen. Hatch). By enacting Section 10(f) but limiting its coverage to benefits payable for permanent total disability or death, Congress provided significant inflation protection once it becomes clear that an individual is likely to rely on LHWCA disability benefits over the long term, while limiting the cost and insurability consequences to covered employers. Compare *Larson's* § 60.62 ("Most [state] adjustment clauses cover only wage-loss benefits for total disability—often only permanent total—and death.") (footnotes omitted).[5]

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[5] Before it enacted Section 10(f) in 1972 (Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 11, 86 Stat. 1258), Congress had rejected proposals that would have required inflation adjustments

2. As we have noted, the decision below conflicts directly with decisions of the Second, Fifth and Ninth Circuits. See pages 6-7, *supra*. It adheres instead to the decision of the former Fifth Circuit in *Holliday* v. *Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A 1981). Pet. App. 2; see *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (decisions of the Fifth Circuit issued on or before September 30, 1981 adopted as binding precedent in the Eleventh Circuit).

Holliday was an unusual case. Like this case, it involved an injured worker who was found to be permanently totally disabled following a period of temporary total disability. At oral argument in *Holliday*, the court asked the attorneys representing the claimant and the Director to submit a joint proposal for computing the claimant's disability under Section 10(f).[6] See 654 F.2d at 417. The attorneys drafted such a proposal and submitted it to the court, which appended it to the opinion in the case. *Id.* at 417, 421-423. In the joint statement, counsel for the Director explained that the claimant's argument that he was entitled to receive retroactive adjustments covering prior periods of temporary disability was incorrect

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for any type of disability award. See S. 2318, 92d Cong., 1st Sess. § 11 (1971); H.R. 12006, 92d Cong., 1st Sess. § 11 (1971); 117 Cong. Rec. 44,321 (1971) (statement of Rep. Daniels); *Bowen*, 912 F.2d at 351 n.4. In 1984, Congress added the present 5% cap on the amount of annual inflation adjustments under Section 10(f). Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 10(b), 98 Stat. 1648 (enacting 33 U.S.C. 910(f)(2)).

[6] The employer and insurance carrier did not participate in the appeal—or, consequently, in the proposal. 654 F.2d at 417.

because adjustments under Section 10(f) "apply only to permanent total disability and death benefits." 654 F.2d at 422. She further represented, however, based on her understanding of the Director's position, that making no adjustment to the claimant's initial rate of compensation for permanent total disability would be "contrary to and frustrate[] the purpose of § 910(f)." *Ibid.* Counsel accordingly proposed a third option, to which the claimant's lawyer agreed: "When the compensation rate changes from temporary total to permanent total disability as of [a specified date], the compensation rate for permanent total disability should include the *intervening percentage increases* under § 910(f)." *Ibid.* The court in *Holliday* adopted that proposal. *Id.* at 417.[7]

The position advanced after argument by the Director's counsel in *Holliday*, and adopted by the court in that case, was not in fact consistent with OWCP's practice at the time. See *Phillips* v. *Marine Concrete Structures*, 895 F.2d 1033, 1035 & n.4 (5th Cir. 1990) (en banc); U.S. Dep't of Labor, LHWCA Circular No. 83-3 (Feb. 23, 1983). OWCP reaffirmed its contrary position after reconsidering the matter in light of *Holliday*, but for a time the Director did not challenge contrary administrative rulings in cases in which appeal would lie to the Fifth Circuit. *Ibid.* In 1986, however, a panel of the D.C. Circuit criticized the Director for not having "present[ed] his disavowal to the circuit that adopted [the *Holliday* rule] on his counsel's urging," and announced that it

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[7] As the full Fifth Circuit commented later when it overruled *Holliday*, the panel's judgment in that case "was more in the nature of approval of a settlement than of a ruling on a contested matter of law." *Phillips*, 895 F.2d at 1035 n.4.

would "accept the *Holliday* ruling as the proper reading of the statute in this circuit at least until the precedent is overruled in the Fifth Circuit, or the Director publicly announces that, prospectively, he will seek to apply his current interpretation even-handedly to all similarly disabled claimants in all circuits." *Brandt* v. *Stidham Tire Co.*, 785 F.2d 329, 332 (D.C. Cir. 1986) (per curiam). One month after the release of the opinion in *Brandt*, the Director announced that his longstanding interpretation of the statute would thenceforth be "applied uniformly in all district offices," including those in the Fifth Circuit. U.S. Dep't of Labor, LHWCA Circular No. 86-2 (Apr. 10, 1986).

When a case in which the Director's position on this issue was accurately represented subsequently arose in the Fifth Circuit, a panel of that court initially followed *Holliday*, but invited the filing of a petition for rehearing en banc. *Phillips* v. *Marine Concrete Structures, Inc.* (*Phillips I*), 877 F.2d 1231, 1237 (1989). On rehearing, the full court unanimously reversed, finding the Director's position to be consistent with the "plain and unambiguous" language of Section 10(f). *Phillips*, 895 F.2d at 1035 ("the 'intervening percentage increases' method of calculation adopted by *Holliday* finds no warrant in the statutory text"). Shortly after that decision was announced in March 1990, the Second and Ninth Circuits likewise concluded that the Director's position embodied the only plausible reading of the statute. *Lozada*, 903 F.2d at 170 (decided May 14, 1990); *Bowen*, 912 F.2d at 351 (decided August 24, 1990) ("In light of the statutory language and legislative history of § 10(f), we are compelled to conclude that the Director's construction of this section is correct"; although "the

result is a harsh one," the "statute is clear, * * * and if it is to be modified, Congress will have to do it"); see also *id.* at 351-352 (Tang, J., concurring) (result "legally compelled").

After the Fifth Circuit had granted rehearing en banc in *Phillips*, but before it had rendered its decision, the Eleventh Circuit decided *Director, OWCP* v. *Hamilton*, 890 F.2d 1143 (1989). In a one-paragraph per curiam opinion, the court acknowledged the Director's concession that the case was governed by *Holliday*, and entered judgment "without prejudice to the Director's right to petition the court for rehearing en banc." *Ibid.* The Director exercised that right, but the court denied his petition—once before the Fifth Circuit's en banc decision in *Phillips* could be brought to its attention, and then again after the Director moved for reconsideration in light of that decision.[8] The court in this case relied on *Hamilton*, repeated its observation that *Holliday* remained binding circuit precedent "barring *en banc* reconsideration" (Pet. App. 2), and then again denied the ensuing petition seeking such reconsideration (*id.* at 3-4). The Eleventh Circuit has thus declined to reconsider its position on this issue even in light of the uniformly contrary conclusion of other circuits (including the Fifth), either at the Director's suggestion or at the request of an aggrieved private employer.[9]

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[8] The second denial also came two weeks after the announcement of the Second Circuit's decision in *Lozada*. The government did not ask this Court to review the *Hamilton* decision.

[9] Because of the peculiar posture of the D.C. Circuit's *Brandt* case (see 785 F.2d at 330 ("In considering the petition for review, we are mindful that this circuit is not destined to

3. The Eleventh Circuit's perpetuation of the erroneous rule mistakenly adopted in the *Holliday* case interferes with the LHWCA's central goal of providing a uniform nationwide workers' compensation scheme for the maritime workers and employers covered by the Act. Implementation of non-uniform rules inevitably increases the Director's burdens and costs in administering the Act. Moreover (and more importantly), in cases in which review lies in the Eleventh Circuit, employees will continue to receive benefits, and employers will continue to bear costs, not authorized by Congress. Although annual cost-of-living adjustments in recent years have typically been small, in the aggregate and over time the Eleventh Circuit's *Holliday* adjustments will continue to impose statutorily unjustified incremental costs that may well appear significant to the employers that must bear them.[10]

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continue as a prominent appellate forum in LHWCA cases.") and its explicitly qualified holding (see *id.* at 332 (based on reluctance to "create a circuit split" by disagreeing with *Holliday*; acceptance of *Holliday* "at least until * * * overruled in the Fifth Circuit, or until the Director publicly announces" uniform adherence to the contrary view)), we believe this issue remains open in the D.C. Circuit. No other court of appeals (apart from those discussed in the text) has addressed the issue.

[10] In *Phillips*, where the claimant was temporarily totally disabled for about twenty-six months before becoming permanently totally disabled, the court calculated that a hypothetical five percent annual *Holliday* adjustment could lead to an increase of more than 15% in an employee's initial rate of permanent disability compensation. See *Phillips I*, 877 F.2d at 1233 n.2; see also *Holliday*, 654 F.2d at 422 (21%). Other reported cases have involved longer initial periods of temporary total disability. See *Lozada*, 903 F.2d at 169 (four years); Pet.

At the same time, the Eleventh Circuit's erroneous ruling on the narrow question of statutory construction presented by this case affects a relatively small absolute number of individuals and employers from a nationwide perspective, involves a relatively small amount of money in the context of the economy as a whole, and is not of broader legal significance. Thus, while we do not oppose resolution of the issue by this Court, we are unable to conclude, despite the real and persistent circuit conflict, that the issue warrants the Court's plenary consideration at the present time. We would not rule out the possibility that the Eleventh Circuit might be prepared to consider the issue en banc and overrule *Holliday* if the Director, who is responsible for administering the LHWCA program (and whose interpretation is entitled to judicial deference), filed or supported a new suggestion of hearing or rehearing en banc urging it to do so. The Director could, for example, bring to that court's attention statistics concerning the number of individuals in the Eleventh Circuit (now more than 180) who receive permanent total disability payments.[11]

App. 6-7 (41 months); *Bowen*, 912 F.2d at 349 (two periods totaling 35 months over 5 1/2 years); *Holliday*, 654 F.2d at 416 (32 months); cf. *Brandt*, 785 F.2d at 332 n.2 (eight years involved in that case "atypical"). The most recent Section 10(f) adjustment (October 1, 1997) was 4.33%. LHWCA Bulletin No. 98-1 (Oct. 1, 1997). Between October 1985 and October 1996, the adjustments ranged from 1.69% to 3.83%. U.S. Dep't of Labor, Employment Standards Admin., *OWCP Annual Report to Congress FY 1996*, at 54 (1997).

[11] OWCP informs us that there were 4390 individuals receiving permanent total disability benefits under the Act as of January 1, 1998. At least 186 of those cases fall within the

If the Court is not inclined to deny the petition (in light of the circuit conflict and the Eleventh Circuit's adherence to *Holliday*), it might also consider two other alternatives to plenary review. First, the Court might wish to consider summary reversal of the judgment below. Second, because the Director did not participate in the proceedings before the panel or in seeking en banc review below in this case, this Court might grant the petition, vacate the judgment of the court of appeals, and remand for further consideration by the panel or the en banc court. Such an order would give the court of appeals the opportunity to reconsider the matter in light of the Director's position, expressed in this brief, concerning the aberrant nature of the Eleventh Circuit's adherence to the former Fifth Circuit's decision in *Holliday*, which has been overruled by the present Fifth Circuit, and the Director's representation concerning the number of individuals in the Eleventh Circuit who are receiving permanent total disability benefits under the Act. See note 11, *supra*.

Eleventh Circuit's jurisdiction. OWCP does not compile data on the incremental costs associated with Section 10(f) adjustments.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to consider summary reversal of the judgment below, or granting the petition for a writ of certiorari, vacating the judgment of the court of appeals, and remanding the case to that court for further consideration in light of the Director's submission in this brief.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARVIN KRISLOV
Deputy Solicitor for National Operations

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

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